

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D.C. 20548

FILE: B-209626**DATE:** January 17, 1983**MATTER OF:** Central Texas College**DIGEST:**

1. Protest by a non-small business firm that a procurement should have been negotiated rather than advertised will not be considered since the protester is ineligible for award and not an interested party to raise such an issue.
2. Where an agency receives five bids in response to a small business set-aside solicitation, and four are within the Government estimate for the services, there is no basis to conclude that the contracting officer's decision to set the procurement aside for small businesses constituted an abuse of discretion.

Central Texas College protests invitation for bids (IFB) No. DAKF48-82-B-0149, a 100 percent small business set-aside, issued by the Department of the Army for operation of a learning center. Central Texas contends that Army regulations require procurements of this type to be negotiated rather than advertised. Central Texas did not submit a bid. We dismiss the protest.

The Army argues that Central Texas is not an interested party to protest here since this procurement was a small business set-aside but Central Texas does not qualify as a small business concern because it is a nonprofit organization. See 13 C.F.R. § 121.3-2(i) (1982); Defense Acquisition Regulation (DAR) § 1-701.1(a)(1) (DAC 76-19, July 27, 1979).

Although Central Texas did not bid on the protested solicitation, the Army has furnished us a copy of Central Texas' bid on another Army solicitation in which the protester certified that it is a nonprofit organization. The date of this certification is August 27, 1982. We consider this sufficient evidence to support a conclusion that Central Texas does not qualify as a small business concern under the regulations. In this regard, a non-small business

024391

firm is not an interested party to protest alleged solicitation deficiencies in a proper small business set-aside since it is ineligible for award and thus would not be affected by the resolution of such issues. See Canadian Commercial Corporation, B-196111, May 29, 1980, 80-1 CPD 369.

We also note that Central Texas did not challenge the propriety of the set-aside itself in either its initial protest or in a follow-up letter setting forth the details of its protest. In a third and subsequent letter, filed after bid opening, the protester did state that few if any educational institutions qualify as small business concerns since most are nonprofit organizations. If this comment was intended as a protest of the set-aside, it is untimely since the basis of protest was apparent prior to bid opening but the issue was not raised until after bid opening. See 4 C.F.R. § 21.2(b)(1) (1982).

In any event, in deciding to make a total set-aside, a contracting officer need only have a reasonable expectation that bids or proposals will be obtained from at least two responsible small business concerns and that award will be made at a reasonable price. DAR § 1-706.5(a)(1). The decision whether such an expectation exists is basically a business judgment within the broad discretion of the contracting officer, and we will sustain such a determination absent a clear showing of abuse of discretion. Ingersoll-Rand, B-207005, April 12, 1982, 82-1 CPD 338.

Here, we are advised that the Army received five bids from small businesses in response to the solicitation, and that four of these were below the Government estimate for the services. Consequently, we would have no basis to conclude that the contracting officer's decision to set this procurement aside for small businesses was an abuse of discretion. See Otis Elevator Company, B-195831, November 8, 1979, 79-2 CPD 341.

The protest is dismissed.

Harry R. Van Cleve
Harry R. Van Cleve
Acting General Counsel